1447

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. ~~823~~ 90.

W. C. LYKINS AND E. W. W. LYKINS, PLAINTIFFS IN ERROR,

vs.

MRS. R. McGRATH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED JUNE 21, 1900.

(17,808.)

(17,808.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 323

W. C. LYKINS AND E. W. W. LYKINS, PLAINTIFFS IN ERROR,

vs.

MRS. R. McGRATH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 15, 1900.

1 THE U. S. OF AMERICA:

To Mrs. R. McGrath, Greeting:

You are hereby cited and admonished to appear in the Supreme Court of the United States sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the third division of the judicial district of Kansas, wherein W. C. Lykins and E. W. W. Lykins are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Hon. William C. Hook, judge of the circuit court of the United States for the district of Kansas, this 11th day of May, in the year of our Lord one thousand nine hundred.

WILLIAM C. HOOK,
United States District Judge for the District of Kansas.

1½ *U. S. Marshal's Return.*

Received this writ at Ft. Scott, Kansas, May 11th, A. D. 1900, and executed same May 11th, 1900, at Ft. Scott, Kansas, by delivering personally to Frank M. Sheridan, attorney for defendant in error, a true and certified copy of the within writ, with all the endorsements thereon.

W. E. STERNS,
U. S. Marshal,
By W. C. MOONEY, *Deputy.*

Fees, $2.00.

[Endorsed:] No. 174. W. C. Lykins and E. W. W. Lykins, pl'ffs, *vs.* Mrs. R. McGrath, def't. Citation. Filed May 16th, 1900. Geo. F. Sharitt, clerk, by S. P. Mosher, dep. cl'k.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the hon. the judge of the circuit court of the United States for the third division of the judicial district of Kansas, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the November, 1899, term thereof, between W. C. Lykins and E. W. W. Lykins, plaintiffs, *vs.* Mrs. R. McGrath, defendant, a manifest error hath happened, to the great damage of the said W. C. Lykins and E. W. W. Lykins, as by their petition appears, we, being willing that error, if any hath been, should be duly corrected and a full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that *you* then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States

Supreme Court, together with this writ, so that *we* have the said record and proceedings aforesaid at the city of Washington, D. C., and filed in the office of the clerk of the United States Supreme Court on or before the — day of ——, 1900, to the end that, the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12 day of May, in the year of our Lord one thousand nine hundred.

Issued at my office, in the city of Fort Scott, with the seal
3 of the circuit court of the United States for the third division of the judicial district of Kansas, dated as aforesaid.

{ The Seal of the Circuit Court of the United States, Third Division, District of Kansas, 1892. }

GEO. F. SHARITT,
Clerk Circuit Court United States, Third Division of the Judicial District of Kansas,
By S. P. MOSHER, *Deputy Clerk.*

Return to Writ.

UNITED STATES OF AMERICA,
Third Division of the Judicial District of Kansas, } *ss:*

In obedience to the command of the within writ I herewith transmit to the United States Supreme Court a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at my office, in the city of Fort Scott, this 12 day of May, A. D. 1900.

{ The Seal of the Circuit Court of the United States, Third Division, District of Kansas, 1892. }

GEO. F. SHARITT, *Clerk,*
By S. P. MOSHER, *Deputy Clerk.*

4 *Transcript.*

In the Circuit Court of the United States for the District of Kansas, Third Division.

W. C. LYKINS & E. W. W. LYKINS, Plaintiffs,
vs.
MRS. R. MCGRATH, Defendant.

Be it remembered that heretofore and on, to wit, the 18th day of March, A. D. 1899, came W. C. Lykins and E. W. W. Lykins, by H. H. McCluer, their attorney, and filed in said court their petition, and sued out of and under the seal of said court a writ of summons against Mrs. R. McGrath.

And the said petition is in the words and figures as follows:

In the Circuit Court of the United States for the District of Kansas, Third Division.

W. C. LYKINS and E. W. W. LYKINS, Plaintiffs,
vs.
MRS. R. MCGRATH, Defendant.

Complaint at Law for Possession of Real Estate.

Plaintiffs, W. C. Lykins and E. W. W. Lykins, for their cause of action against the defendant, Mrs. R. McGrath, state that they are members of the Peoria tribe of Indians and reside in the northern district of the Indian Territory, and that the defendant is a citizen of the United States and resides in the third division of district of Kansas.

That under and by virtue of the provisions of a treaty between the United States and the Kas-kas-kia, Peoria, and other confederated tribes of Indians, proclaimed August 10th, 1854, the southeast
5 quarter of section fifteen (15), in township seventeen (17) south of range twenty-three (23) east, in the State of Kansas, was patented to Ma-cha-co-me-yah, or David Lykins, a member of said Peoria tribe of Indians, being Peoria reservee No. fourteen (14); that the patent for said land contained a restriction on the sale of said land; that said restriction provided that said land could not be sold by said reservee or by his heirs except with the consent and approval of the Secretary of the Interior of the United States; that on or about the 14th day of August, 1864, the said reservee, Ma-cha-co-me-ah or David Lykins, departed this life intestate and left as his sole heirs his two sons, plaintiffs herein; that by virtue of the premises plaintiffs are the owners and entitled to the immediate possession of said land and have been ever since the said 14th day of August, 1864; that said land is of the value of $5,000.00.

Plaintiffs further state that on or about the 3rd day of June, 1864, the said reservee attempted to convey said land to one Baptiste Peoria by a deed of said date; that said deed was not approved by the Secretary of the Interior of the United States during the lifetime of the said reservee, but that same was after the death of the said reservee and on March 6th, 1865, presented to and approved by said Secretary without the knowledge or consent of these plaintiffs; that said deed, not having been approved by said Secretary during the lifetime of the said reservee, was and is inoperative and void; that the defendant is wrongfully in the possession of said land, claiming the same through successive conveyances from said Baptiste Peoria, and has been since the — day of ——, 1865.

That plaintiffs have been damaged by said unlawful holding of said land by the defendant in the sum of two thousand five
6 hundred dollars; that the value of the monthly rents and profits on said land is thirty dollars ($30.00) per month.

Plaintiffs therefore ask judgment against the said defendant for

the possession of said land, and for damages, monthly rents, and prophets and costs of suit.

W. C. LYKINS,
E. W. W. LYKINS, *Plaintiffs*,
By H. H. McCLUER, *Their Att'y.*

Endorsed on back: No. 174. W. C. Lykins *et al.*, pl'ffs. *vs.* Mrs. R. McGrath, def't. Complaint at law. Filed Mar. 18, 1899. Geo. F. Sharitt, clerk, by S. P. Mosher, dep. cl'k. H. H. McCluer, att'y for pl'ffs.

In the Circuit Court of the United States, District of Kansas, Third Division.

W. C. LYKINS and E. W. W. LYKINS, Plaintiffs,)
vs.
MRS. R. MCGRATH, Defendant.)

To the clerk of the circuit court:

You will please issue summons in the above-entitled cause for the defendant, Mrs. R. McGrath, and deliver same to the marshal. Defendant lives about one mile east of Paola, Ks.

H. H. McCLUER,
Att'y for Pl'ffs.

Endorsed on back: No. 174. W. C. Lykins *et al. vs.* Mrs. R. McGrath. Precipe for summons. Filed Mar. 18, 1899. Geo. F. Sharitt, clerk, by S. P. Mosher, dep. cl'k.

7 And the said summons and proof of service is in words and figures as follows, to wit:

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,)
District of Kansas, 3rd Division,) *ss:*

The United States of America to the marshal of the district of Kansas, Greeting:

You are hereby commanded to notify Mrs. R. McGrath (about one mile east of Paola, Kansas) that she has been sued by W. C. Lykins & E. W. W. Lykins, in the circuit court of the United States for the district of Kansas, and that unless she answers by the 20th day of April, A. D. 1899, the petition of the said W. C. Lykins and E. W. W. Lykins against her filed in the clerk's office of the said court, such petition will be taken as true and judgment rendered accordingly. You will make due return of this writ on the 30th day of March, A. D. 1899.

The Seal of the Circuit Court of the United States, Third Division, District of Kansas, 1892.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Fort Scott, in said district, this 18th day of March, A. D. 1899.

GEO. F. SHARITT, *Clerk*,
By S. P. MOSHER, *Dep. Clk.*

Suit brought for the recovery of money; amount claimed, $25,000.00.

Damages, for the possession of said land, monthly rents, and profits and costs of suit.

H. H. McCLUER,
Miami, I. Ty., Attorney for Plaintiffs.

8 Endorsed on back: No. 174. Circuit court of the United States, district of Kansas, 3rd division. W. C. Lykins and E. W. W. Lykins *vs.* Mrs. R. McGrath. Summons. Issued M'ch 18, 1899. Returnable M'ch 30, 1899. Filed Mar. 28, 1899. Geo. F. Sharitt, clerk, by S. P. Mosher, dep. cl'k. H. H. McCluer, Miami, I. Ty., attorney for plaintiffs.

U. S. Marshal's Return.

DISTRICT OF KANSAS, *ss:*

Received the within writ March the 22nd, 1899, and served same on the within-named Mrs. R. McGrath by leaving a true and certified copy, with all the endorsements thereon, of the within writ at her usual place of residence, with an adult member of the family, at Paola, Kansas, Sat., March 25th, A. D. 1899.

W. E. STERNE,
U. S. Marshal,
By W. C. MOONEY, *Deputy.*

Marshal's fee and costs, $5.66.

And afterwards and on, to wit, the 3rd day of May, A. D. 1899, came the defendant, by her attorneys, and in open court asked permission to file her demurrer to plaintiffs' petition; thereupon the court made the following order, which was filed and duly entered of record:

In the Circuit Court of the United States for the District of Kansas, Third Division.

W. C. LYKINS and E. E. W. LYKINS, Plaintiffs,
v.
MRS. R. C. MCGRATH, Defendant.

Order.

On application of the defendant she is hereby given permission to file a demurrer to the petition of the plaintiffs on this day.

WILLIAM C. HOOK, *Judge.*

9 Endorsed on back: No. 174. W. C. Lykins *et al. v.* R. C. McGrath. Order permitting def't to file demurrer to petition. Filed May 3, 1899. Geo. F. Sharitt, clerk, by S. P. Mosher, dep. cl'k. J. B., 147.

And afterwards and on, to wit, the 3rd day of May, 1899, came the defendant, Mrs. R. McGrath, by her attorneys, F. M. Sheridan & W. C. Perry, and file their demurrer to plaintiffs' petition; which demurrer is in the words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Kansas, Third Division.

W. C. LYKINS and E. W. W. LYKINS, Plaintiff-,
v.
MRS. R. C. MCGRATH, Defendant.

Demurrer to the Petition.

Now comes the defendant and demurrs to the petition of the plaintiffs in the action above entitled for the reason that said petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff- or either of them and against the defendant.

F. M. SHERIDAN,
W. C. PERRY,
Att'y- for Defendant.

Endorsed on back: No. 174. W. C. Lykins *et al. v.* R. C. McGrath. Demurrer to petition. Filed May 3, 1899. Geo. F. Sharitt, clerk, by S. P. Mosher, dep. cl'k.

10 And afterwards and, to wit, on the 3rd day of May, 1899, this cause came on for hearing upon the demurrer of the defendant to plaintiffs' petition, as follows, to wit:

W. C. LYKINS ET AL.
v.
R. C. MCGRATH.

Now, on this day, the action above entitled came on for hearing on the demurrer of the defendant to the petition of the plaintiffs. The plaintiffs appeared by their attorney, H. H. McCluer, and the defendants by their attorneys, Holmes & Perry and Frank M. Sheridan, and the court, being fully advised in the premises, doth now sustain said demurrer; to which ruling of the court the plaintiffs at the time duly excepted, and said plaintiffs, on their application, are given until August 1st next to file an amended petition, and the defendant is given until September 1st next to plead to said amended petition.

Endorsed on back: # 174. Journal entry. Filed May 3, 1899. Geo. F. Sharitt, clerk, by S. P. Mosher, dep. cl'k. J. B., 148.

11 And afterwards and on, to wit, the 31st day of July, A. D. 1899, came the plaintiffs, by their attorneys, H. H. McCluer and Keene and Gates, and filed their amended petition herein, which is in the words and figures as follows, to wit:

UNITED STATES, *State of Kansas,* } ss:

In the United States Circuit Court for the District of Kansas, Third Division, Sitting at Fort Scott.

W. C. LYKINS and E. W. W. LYKINS, Plaintiffs,
vs.
MRS. R. C. MCGRATH, Defendant.

Amended Complaint.

Plaintiffs, W. C. Lykins and E. W. W. Lykins, for their cause of action against the defendant, Mrs. R. C. McGrath, state they are members of the Peoria tribe of Indians and reside in the northern district of the Indian Territory; that the defendant, Mrs. R. C. McGrath, is a citizen of the United States and resides in the third division of the United States court for the district of Kansas.

That under and by virtue of the provisions of a treaty between the United States of America and the Kas-kas-kia, Peoria, and other confederated tribes of Indians, concluded on the 30th day of May, 1854, proclaimed August 10th, 1854, and act of Congress approved March 3rd, 1859 (U. S. Statutes, vol. 11, page 430), the southeast quarter of section No. fifteen (15), in township No. seventeen (17) south of range No. twenty-three (23) east, in the State of Kansas, was conveyed by the United States of America by letters patent to Ma-cha-co-me-yah, or David Lykins, a member of the said Peoria tribe of Indians, being "Peoria reservee No. 14." A certified copy of said patent is herewith filed, marked Exhibit "A," and made a part hereof.

12 That the said patent for the said land, issued as aforesaid, under and by virtue of the 11th section of the said act of Congress approved March 3rd, 1859, contained a clause restraining the alienation of the said land by the said reservee or by his heirs without the consent of the Secretary of the Interior of the United States, which said restriction was as follows, viz: "That said tracts shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior for the time being."

That the said grantee, Ma-cha-co-me-yah, or David Lykins, never sold or conveyed the said land, with the consent of the Secretary of the Interior, during his lifetime, and on or about the 14th day of August, 1864, departed this life intestate, and left surviving him, as his sole heirs-at-law, his two children, plaintiffs herein, and that at his death the said land descended to and became the property of plaintiffs, who now own the same and are entitled to the immediate and exclusive possession thereof and have been ever since the said 14th day of August, 1864.

Plaintiffs further state that on or about the 3rd day of June, 1864, the said reservee, Ma-cha-co-me-yah, or David Lykins, attempted to convey the said land to one Baptiste Peoria by a deed of said date without the consent of the Secretary of the Interior; that the Secretary of the Interior did not give his consent to the said conveyance

in any manner or approve the same during the lifetime of the said reservee, and that the said reservee at no time asked the consent of the Secretary to make the said conveyance and never in any way requested his approval of the same after it was made, but that the same was after the death of the said reservee and on March 10th, 1865, presented to the said Secretary and by him approved; that the said presentation and approval was without the knowledge or consent of these plaintiffs; that the said conveyance, having been made without the consent of the Secretary of the Interior and never having been approved by him during the lifetime of the
13 grantor, was and is inoperative and void; that the defendant is now claiming the said land through successive conveyances from the said Baptiste Peoria, and is in the unlawful possession of the same and has been since the — day of ——, 1865.

That plaintiffs have been damaged by the said unlawful holding of said land by the said defendant in the sum of twenty-five hundred dollars; that the value of the said land is five thousand dollars, and the value of the monthly rents and profits is thirty dollars per month.

Plaintiffs therefore ask judgment for the possession of the said land and for damages, as aforesaid, and said monthly rents and profits, and for costs of suit.

H. H. McCLUER &
KEENE & GATES,
Attorneys for Plaintiff.

"EXHIBIT A."

4–146.

THE UNITED STATES OF AMERICA:

KASKASKIA and PEOR-A, PIANKESHAN and WEAS. No. 14.

To all to whom these presents shall come, Greeting:

Whereas by the 2nd and 3rd articles of the treaty concluded on the 30th day of May, A. D. 1854, by the commission on the part of the United States and certain delegates of the united tribes of Kaskaskia and Peoria, Piankeshan and Wea Indians, it is agreed that selections of lands shall be made for individuals and heads of families of said united tribes;

And whereas a return, dated 31st August, 1858, from the Commissioner of Indian Affairs has been made to the General Land Office, accompanied by "Reservation Book A," whereby it appears that on the 28th August, 1858, the Secretary of the Interior approved for Ma-cha-co-me-yah, or David Lykins, the following selection, viz., the northwest quarter of section twenty-three (160 acres), the southwest quarter of section fourteen (160 acres), the southeast quarter of section fifteen (160), the southwest quarter of section fifteen (160 acres), and the northeast quarter of section twenty-two (160 acres), all in township seventeen south of range twenty-three east of the sixth

principal meridian in Kansas, containing in the ag- eight
14 hundred acres:

Now know ye that the United States of America, in consideration of the premises and pursuant to the provisions of the treaty aforesaid, have given and granted and by these presents do give and grant unto the said Ma-cha-come-yah, or David Lykins, and to his heirs the tracts of land above described on the condition, as prescribed by the Secretary of the Interior under the provisions of the 11th section of the act of Congress approved March 3rd, 1859 (U. S. Statutes, vol. 11, page 430), that the said tracts "shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior for the time being;" to have and to hold the said tracts or parcels of land, with the appurtenances, unto the said Ma-cha-come-yah, or David Lykins, and to his heirs and assigns forever, with the condition aforesaid.

In testimony whereof I, James Buchanan, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this first
[L. S.] day of November, in the year of our Lord one thousand eight hundred and fifty-nine, and of the Independence of the United States the eighty-fourth.

By the President:

JAMES BUCHANAN,
By J. B. LEONARD, *Secretary.*

J. N. GRANGER,
Recorder of the General Land Office.

Rec., vol. —, page 14.

Endorsed on back: No. 174. W. C. Lykins *et al. vs.* Mrs. R. M. McGrath. Amended petition. Filed July 31, 1899. Geo. F. Sharitt, clerk, by S. P. Mosher, dep. cl'k. H. H. McCluer & Keene & Gates, att'y- for pl'ff-.

And afterwards and on, to wit, the 23d day of August, A. D. 1899, came the defendant, by her attorneys, Holmes & Perry & Frank M. Sheridan, and files her demurrer to plaintiff's amended petition, which is in the words and figures as follows, to wit:

15 In the Circuit Court of the United States within and for the District of Kansas, Third Division.

W. C. LYKINS and E. W. W. LYKINS, Plaintiffs,
v.
MRS. R. C. MCGRATH, Defendant.

Demurrer to the Amended Petition.

Now comes the defendant and demurs to the amended petition of the plaintiff in the action above entitled for the reasons following, to wit:

1. Said petition does not state facts sufficient to constitute a cause of action in favor of the plaintiffs or either of them and against the defendant.

2. Said petition on its face shows that the pretended cause of action therein set forth is barred by the 4th clause of section 10 of chapter 95 of volume 2 of the General Statutes of Kansas 1897, in that this action was not commenced within fifteen years from the time the alleged cause of action accrued to the plaintiffs.

Wherefore the defendant prays judgment against the plaintiffs for her costs.

HOLMES & PERRY,
FRANK M. SHERIDAN,
Attorneys for Plaintiffs.

Endorsed on back: No. 174. W. C. Lykins and E. W. W. Lykins *v.* Mrs. R. C. McGrath. Demurrer to amended petition. Filed Aug. 23, 1899. Geo. F. Sharitt, clerk, by S. P. Mosher, dep. cl'k. Holmes & Perry, attorneys-at-law, Kansas City, Mo.

16 And afterwards and on, to wit, the 22nd day of November, A. D. 1899, at the November, A. D. 1899, term of said court, this cause came on for hearing on the demurrer of the defendant to the plaintiffs' amended petition, as follows, to wit:

In the Circuit Court of the United States for the District of Kansas, Third Division.

W. C. and E. W. LYKINS, Plaintiffs,
vs.
MRS. R. MCGRATH, Defendant.

Order.

Now, on this 22nd day of November, 1899, the action above entitled came on for hearing on the demurrer of the defendant to the amended petition of the plaintiffs, and the court, having heard the argument of counsel and being fully advised in the premises, doth now hereby sustain said demurrer; to which ruling of the court the plaintiffs duly excepted.

And said plaintiffs, not desiring to amend their petition, but announcing that they stood thereon, final judgment in favor of, on the merits and for costs, was, and hereby is, awarded, for which let execution issue.

JNO. A. WILLIAMS, *Judge.*

Endorsed on back: No. 174. W. C. Lykins *v.* Mrs. R. McGrath. Judgment entry. Filed Nov. 22, 1899. Geo. F. Sharitt, clerk, by S. P. Mosher, dep. cl'k. Jour. B., p. 191.

17 And on, to wit, the 8th day of May, 1900, came again the said plaintiffs, by their attorneys aforesaid, and filed in said court and said cause their bond, and sued out of said court a writ of

error and citation to the Supreme Court of the United States, and said bond is in words and figures as follows, to wit:

Know all men by these presents that we, W. C. Lykins and E. W. W. Lykins and C. A. Middaugh, are held and firmly bound unto Mrs. R. McGrath in the full and just sum of two hundred dollars, to be paid to the said Mrs. R. McGrath, her heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of May, in the year of our Lord one thousand nine hundred.

Whereas lately, at the November term, A. D. 1899, of the circuit court of the United States for the third division of the judicial district of Kansas, in a suit depending in said court between W. C. Lykins and E. W. W. Lykins, plaintiff-, and Mrs. R. McGrath, defendant, judgment was rendered against the said plaintiffs, W. C. Lykins and E. W. W. Lykins, and the plaintiffs, W. C. Lykins and E. W. W. Lykins, *has* obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Mrs. R. McGrath, citing and admonishing her to be and appear in the Supreme Court of the United States sixty days from and after the date of said citation:

Now, *on* the condition of the above obligation is such that if the said plaintiffs, W. C. Lykins and E. W. W. Lykins, shall prosecute said writ of error to effect and answer all damages and cost if they
18 fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

W. C. LYKINS. [SEAL.]
E. W. W. LYKINS. [SEAL.]
C. A. MIDDAUGH. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved by—
WILLIAM C. HOOK, *Judge.*

STATE OF KANSAS, } ss:
Cherokee County, }

C. A. Middaugh, of lawful age, being duly sworn, on his oath says that he is a resident of Cherokee county, Kansas, and that he is worth over and above all of his exemptions and liabilities more than the sum of two hundred dollars, and that same is in property in said county.

C. A. MIDDAUGH.

Subscribed and sworn to before me this 10th day of May, 1900.

H. A. HICKS,
Notary Public.

[L. S.]

My commission expires Nov. 25th, 1900.

Endorsed on back: No. 174. United States circuit court, third division of the judicial district of Kansas. W. C. Lykins and E. W. W. Lykins, pl'tffs, *vs.* Mrs. R. McGrath. Bond, $200.00. Filed May 8, 1900. Geo. F. Sharitt, clerk, by S. P. Mosher, dep. cl'k.

19 In the Circuit Court of the United States for the District of Kansas, Third Division.

W. C. LYKINS and E. W. W. LYKINS, Plaintiffs,
vs.
MRS. R. MCGRATH, Defendant. } No. 147.

Upon application of the plaintiffs and by consent of the defendant herein, the order made in this cause on April 26, 1900, fixing the supersedeas bond at five hundred dollars is hereby modified so as to read two hundred dollars.

May 8, 1900.

WILLIAM C. HOOK, *Judge.*

Endorsed on back: No. 174. Order of court. Filed May 8, 1900. Geo. F. Sharitt, clerk, by S. P. Mosher, dep. cl'k.

Assignment of Errors.

In the Circuit Court of the United States for the District of Kansas, Third Division.

W. C. LYKINS and E. W. W. LYKINS, Plaintiffs,
vs.
MRS. R. MCGRATH, Defendant.

The plaintiffs in the above-entitled action, in connection with their petition for writ of error, make the following assignment of errors which they aver occur-ed upon the trial of said action, and which said errors appear on the record, to wit:

First. The court erred in sustaining defendant's demurrer to plaintiffs' original petition.

Second. The court erred in sustaining defendant's demurrer
20 to plaintiffs' amended petition.

Third. The court erred in rendering judgment in the action in favor of the defendant and against the plaintiffs.

Wherefore said plaintiffs pray that the judgment of said circuit court may be reversed and set aside; that said circuit court be directed to render judgment in favor of these plaintiffs; that they may be restored to all things they have lost in consequence of said judgment, and that they recover judgment for their costs in this behalf expended.

H. H. McCLUER,
Attorney for Plaintiffs.

Endorsed on back: No. 174. W. C. Lykins and E. W. W. Lykins *vs.* Mrs. R. McGrath. Assignment of errors. Filed Apr. 17th, 1900. Geo. F. Sharitt, clerk, by S. P. Mosher, dep. cl'k.

Petition for Writ of Error.

In the Circuit Court of the United States for the District of Kansas, Third Division.

W. C. LYKINS and E. W. W. LYKINS, Plaintiffs,
vs.
MRS. R. MCGRATH, Defendant.

Come now the plaintiffs in the action above entitled and say that on or about the 22nd day of November, 1899, this court entered judgment herein in favor of the defendant and against the plaintiffs, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of the plaintiffs, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore these plaintiffs pray that a writ of error may issue in this behalf to the United States Supreme Court for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court.

H. H. McCLUER,
Attorney for Plaintiffs.

21 Endorsed on back: No. 174. W. C. & E. W. W. Lykins, *vs.* Mrs. R. McGrath. Petition for writ of errors. Filed Apr. 16, 1900. Geo. F. Sharitt, clerk, by S. P. Mosher, dep. cl'k.

Order Allowing Writ of Error.

In the Circuit Court of the United States for the District of Kansas, Third Division.

W. C. LYKINS and E. W. W. LYKINS, Plaintiffs,
vs.
MRS. R. MCGRATH, Defendant.

On this 16th day of April, 1900, came the plaintiffs, by their attorney, and filed herein and presented to the court their petition praying for the allowance of a writ of error intended to be urged by them; praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Supreme Court, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the plaintiffs giving bond according to law in the sum of five hundred dollars, which shall operate as a supersedeas bond.

WILLIAM C. HOOK, *Judge.*

21½ [Endorsed:] (*l*) No. 174. Order allowing writ of error. Filed Apr. 17th, 1900. Geo. F. Sharitt, clerk, by S. P. Mosher, dep. cl'k. O. B. A., 218.

22 UNITED STATES OF AMERICA, } ss:
District of Kansas, Third Division, }

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct transcript of the record and proceedings heretofore in said court and in a certain cause lately in said court pending wherein W. C. Lykins and E. W. W. Lykins were plaintiffs and Mrs. R. McGrath was defendant, as fully and completely as the same still remains on file or of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Fort Scott, in said district of Kansas, this 12 day of May, A. D. 1900.

{ The Seal of the Circuit Court of the United States, Third Division, District of Kansas, 1892. }

GEO. F. SHARITT, *Clerk,*
By S. P. MOSHER, *Deputy Clerk.*

Endorsed on cover: File No., 17,808. Kansas C. C. U. S. Term No., 323. W. C. Lykins and E. W. W. Lykins, plaintiffs in error, *vs.* Mrs. R. McGrath. Filed June 21st, 1900.

No. 90.

Brf. of Springer for

Office Supreme Court U. S.
FILED
JUL 6 1901
JAMES H. McKENNEY,
Clerk.

Filed July 6 1901.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1900.

W. C. LYKINS and E. W. W. LYKINS, Plaintiffs in Error,
vs.
MRS. R. McGRATH.
No. 323.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF KANSAS.

STATEMENT OF CASE, BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

W. M. SPRINGER AND
ROBINSON, BOWLING & McCLUER,
Attorneys for Plaintiffs in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1900.

W. C. LYKINS and E. W. W. LYKINS, Plaintiffs in Error,
vs.
MRS. R. McGRATH.
No. 323.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF KANSAS.

STATEMENT OF CASE, BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

This is a suit instituted by Plaintiffs in Error in the United States Circuit Court for the District of Kansas, to recover possession of one hundred and sixty acres of land in said District and $2,500.00 damages for the unlawful withholding of same.

On July 31st, 1899, Plaintiffs in Error filed their amended petition (Page 7, Printed Record.)

This amended petition states that Plaintiffs in Error are members of the Peoria tribe of Indians and reside in the Northern District of the Indian Territory; that Defendant in Error is a citizen of the United States and resides in the Third Division of the United States Court for the District of Kansas.

That under and by virtue of the provisions of a treaty between the United States and the Kas-kas-kia, Peoria and other confederated tribes of Indians, concluded on the 30th day of May, 1854, proclaimed August 10th, 1854, and Act of Congress approved March 3rd, 1859 (U. S. Statutes, Vol. 11, P. 430), the southeast quarter of Section No. Fifteen (15), in Township No. Seventeen (17), south of Range No. Twenty-three (23) east, in the State of Kansas, was conveyed by the United States of America by letters patent to Ma-cha-co-me-yah, or David Lykins, a member of said Peoria tribe of Indians, being "Peoria Reserve No 14." (A copy of patent attached to Petition; Printed Record, Page 8.)

That the said patent, issued under and by virtue of the 11th Section of said Act of Congress contained a clause restraining the alienation of said land by said reservee, or by his heirs, without the consent of the Secretary of the Interior, as follows:

"That said tracts shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior, for the time being."

That the said grantee, Ma-cha-co-me-yah, or David Lykins, never sold or conveyed the said land, with the consent of the Secretary of the Interior, during his lifetime, and on or about the 14th day of August, 1864, departed this life intestate, and left surviving him, as his sole heirs-at-law, his two children, plaintiffs herein, and that at his death the said land descended to and became the property of plaintiffs, who now own the same and are entitled to the immediate and exclusive possession thereof and have been ever since the 14th day of August, 1864.

That on or about the 3rd day of June, 1864, the said reservee, Ma-cha-co-me-yah, or David Lykins, attempted to convey the said land to one Baptiste Peoria by a deed of said date without the consent of the Secretary of the Interior; that the Secretary of the Interior did not give his consent to the said conveyence in any manner or approve the same during the lifetime of the said reservee, and that the said reservee at no time asked the consent of the Secretary to make the said conveyance, and never in any way requested his approval of the same after it was made, but that the same was, after the death of the said reservee, and on March 10th, 1865, presented to the said Secretary and by him approved; that the said presentation and

approval was without the knowledge or consent of these plaintiffs; that the said conveyance, having been made without the consent of the Secretary of the Interior and never having been approved by him during the lifetime of the grantor, was and is inoperative and void; that the defendant is now claiming the said land through successive conveyances from the said Baptiste Peoria and is in the unlawful possession of the same and has been since the ——— day of ————————, 1865.

That plaintiffs have been damaged by the said unlawful holding of said land by the said defendant in the sum of Twenty-five Hundred Dollars; that the value of the said land is Five Thousand Dollars, and the value of the monthly rents and profits is Thirty Dollars per month.

On August 23rd, 1899, Defendant in Error filed her demurrer to said amended complaint, stating as grounds therefor

First. Said petition does not state facts sufficient to constitute a cause of action in favor of the plaintiffs or either of them and against the defendant.

Second. That said petition on its face shows that the pretended cause of action therein set forth is barred by the fourth clause of Section 10, of Chapter 95, of Volume 2, of the General Statutes of Kansas, 1897, in that this action was not commenced within fifteen years from the time the alleged cause of action accrued to the plaintiffs.

On November 22nd, 1899, the above demurrer was by the Court sustained, to which ruling of the Court, Plaintiffs in Error excepted. And not desiring to amend their petition, but announcing that they stood thereon, final judgment was rendered against them (Printed Record, Page 10.) The case was then brought to this Court by Writ of Error.

SPECIFICATIONS OF THE ERRORS RELIED ON.

The decree of the United States Circuit Court for the District of Kansas, rendered on the 22nd day of November, 1899, is erroneous and against the just rights of the Plaintiffs in Error and of each of them for the following reasons:

The Court erred in sustaining the demurrer to the amended petition.

First. The petition stated that the land in suit had been patented to David Lykins by the United States; that he had departed this life and left Plaintiffs in Error as his sole heirs and that title to the same had vested in them by inheritance, and they were entitled to recover from Defendant in Error who was in possession.

Second. The attempted conveyance of David Lykins was void; never had been approved by the Secretary of the Interior during the lifetime of the said Lykins.

Third. This land, having under the treaty of May 30th, 1854, been allotted to David Lykins for himself and family, could not have been sold by him alone.

He owned same for the joint benefit of himself and family.

Fourth. The attempted conveyance of David Lykins was never delivered as a completed deed, and intended to convey during his life time.

Fifth. The statute of limitation is no defense to this suit.

FIRST POINT.

The petition stated a good cause of action, and the demurrer should have been overruled, unless the attempted sale of David Lykins, approved after his death, passed title to the same.

The real question presented is as to the power of the Secretary of the Interior to approve the deed, so as to make it a valid conveyance, after the death of the grantor. The land involved was conveyed to David Lykins, or Ma-cha-co-me-yah, under a patent issued to him by the United States, under the provisions of an act of Congress approved March 3rd, 1859 (U. S. Statutes, Vol. 11, Page 430) which said act was passed in carrying out the provisions of the treaty, concluded on the 30th day of May, A. D. 1854, between the United States and the Kas-kas-kia and Peoria, Pinakeshaw and Wea Indians (Revisions of Indian Treaties, Page 426), and the said patent, as prescribed by the Secretary of the Interior, under the provisions of the 11th section of said act contained a clause which is as follows, viz: "Said tracts shall never be sold or conveyed by the grantee, or his heirs, without the consent of the Secretary of the Interior, for the time being."

This patent conveyed to the allottee a title in fee simple. In describing an estate conveyed under a similar law the Supreme Court says: "The title conveyed Hurr by the patent was a fee simple; that is, it was all the title or interest in the land; no one shared this title or any interest in it, and it descended or would have descended, to his heirs. The restriction of his right to convey did not deprive the title of the character of a fee simple estate. An estate in fee simple is where a man has an estate in lands or tenements, to him and his heirs forever."

Libby vs. Clark, 6. Sup. Rept., 1045.

The title was not in the United States in trust for him, as in many cases, or in him and the United States jointly, but was in him alone. He and he only could sell it. His power of sale was limited to sale made with the consent of the Secretary, but still any sale made would be his act and deed and not that of the Secretary.

The Secretary could not, at his request, make sale of the land. A deed, to be operative, must be the act of the grantor, with the consent of the Secretary, and the validity of the same should be deter-

mined by the law applicable to all other conveyances, viz: To be operative as a conveyance, it must be complete during the lifetime of the grantor. It is a fundamental principle of the law, that needs no citation of authorities to support, that in order for a deed to be good as a conveyance, it must be signed, sealed and delivered during the lifetime of the grantor. Unless delivered it will be invalid, although signed and sealed. It is not complete until delivered and till complete in every way is not effectual to convey any interest.

An Indian deed to be valid must be signed, sealed, delivered and approved during the lifetime of the grantor. Approval is as essential to the validity of the deed as is signature or delivery. And if one can not be done after the death of the grantor; neither can the other, without signature and delivery, it is void, so also without approval.

Making and sending a deed to the Secretary, for his approval, was not as strong as giving him a power of attorney to sell, and that would have been revoked by death. *Hunt vs. Rousmanier*, 8 Wheat., 175. In the case just cited there was a power of attorney given to secure the payment of certain notes, and it was held that the death of the grantor deprived the attorney of all power. He could not make an effectual sale for a dead man. A deed by an attorney in fact executed before, but delivered after, the death of the principal is inoperative. *Kent vs. Cecil*, 25 So. Western, 715. The above decision was rendered in Texas, where it is held that, if the attorney has power to convey, the conveyance is binding on the principal, and conveys his title, though the conveyance be made without reference to him. *Trinity Co. Lumber Co. vs. Pinckard*, 23 So. Western, 720, and cases cited. Now, if an attorney who has the right to sell in his own name, without referring to his principal, can not after executing the deed, make the same valid, by handing to the grantee, after the death of the principal, how much less can the deed of the Indian be made to pass his title, by an approval of a deed in his name, after his death, especially when we consider that the Secretary could not make the deed himself, as could the attorney, and at most only had the authority to consent that the Indian might make a sale? Why could not the deed of the attorney be held good by a fiction of the law as well as this? His power to act was terminated by death, and being gone, could not be extended or lengthened by the doctrine of relation. So, in this case, the power to act terminated with the death of the grantor.

After his death, nothing could be done in his name or behalf. He could neither ask nor be granted consent to sell. *At his death all of his acts were complete, or must be left incomplete for all time to come.*

In this case there is nothing to show that the grantor ever requested the Secretary to consent for him to sell, either by sending a deed for approval, or otherwise, or that he ever authorized any one to do it for him. The most that can be assumed is that the grantor attempted to make a sale, without the approval of the Secretary, which sale was ineffectual, and that after his death some one procured the approval of his deed, without the knowledge or consent of the heirs. There is nothing showing that the approval of this deed was ever contemplated till after the death of the grantor.

Approving the deed without the request of the heirs or the grantor, and after the death of the grantor, was simply an attempt to make an invalid deed valid. Such a power has not been vested in the Secretary; he could only consent for the Indian to make a deed himself. If this deed had received the approval of the Secretary during the lifetime of the grantor it might, and probably would, by a fiction of law, be held to have been effectual as of its date. But this would have been a pure fiction of the law and is never indulged when it will violate fundamental principles, as would be done in this case. Again, if the Secretary did not have the authority to approve a deed of a dead man, his act could not be made good by a retroactive ratification. It is only when the act done is lawful in itself, and there is a question as to the time when it shall be operative, that this principle of the law can be invoked, and not when the act itself has to be dated back to make it valid. The question in this case is wholly unlike one where the grantee has died. In such a case we can see no good reason why the instrument could not be held to be effective. In such cases the grant would inure to the heirs or assigns of the grantee. This has been held in many cases both in Kansas and elsewhere. Several patents issued by the United States after the death of the grantee being made operative to convey the title to the heirs. But I think no case can be found in the books where the deed of a dead man has been approved or validated after his death, so as to divest the title once vested in his heirs. Of course, there are cases where a deed, perfect in itself, has been delivered to a third party, to be delivered to the

grantee, that have been held operative, although not handed to the grantee himself till after the death of the grantor. But in all of those cases it will be found that the deed was perfect in itself, did not lack signature, approval or any other formality, was intended as a present transfer, and by parties who at the time, had the right to make it. Here the deed itself incomplete, the grantor, without the consent of the Secretary, did not have the right to make the same; the deed at the time of the grantor's death was imperfect, incomplete and ineffectual to convey anything. David Lykins never, during his lifetime, had the consent of the Secretary to sell, without which he could not have made a valid sale. Never having had authority to sell, the land at his death descended to his heirs. The title can regularly pass out of the person in whom it is vested only by a conveyance in his own name, and this can not be executed by another for him when he could not do it himself. A conveyance in the name of a person who was dead at the time would be a manifest absurdity. *Hunt vs. Rousmanier*, 8 Wheat., 202. The decisions hold that the retroactive efficacy of the ratification is subject to this qualification, the intervening rights of third persons can not be defeated by the ratification. This proposition is clearly laid down in the cases of *Pickering vs. Lomax*, 12 Sup. Repts., 866, and *Murry vs. Wotten*, 17, Wend., 531. In this case up to the death of the grantor, David Lykins, the deed was void. In relation to an unapproved deed, the Supreme Court of Kansas uses this language: "In this case Early has no power to convey his land, except with the consent of the Secretary of the Interior, and as that consent was never obtained, said attempted conveyance must, of course, be void." *Clark vs. Akers*, 16 Kans., 166. In this case a deed made to the second purchaser who had full knowledge of the first attempted sale was held good. See also to the same effect:

McGannon vs. Straightledge, 37 Kans., 506.

Pennock vs. Monroe, 5 Kans., 578.

Comm'rs of Miami Co. vs. Wan-zop-pe-che, 3 Kans., 364.

The Kansas Indians, 5 Wal., 164.

Stevens vs. Smith, 2 Kans., 243.

Stevens vs. Smith, 10 Wall., 321.

Then, if the conveyance, without the approval of the Secretary, was at the death of the grantor, void, the title at once vested in his heirs. If, for any reason the deed was not sufficient to convey the title at that time this result would follow. If at the time of his death it was in his heirs; no subsequent act could divest them of their rights without their consent. To hold that the act of the Secretary in attempting to validate this deed caused it to be operative so as to divest the heirs of the title once vested would be in violation of the fifth amendment to the Constitution of the United States, as depriving them of their rights without due process of law. The rights of the plaintiffs clearly intervened between the original making of the deed and the attempted approval. There were two ways that the rights of third parties might intervene—one by purchase and the other by inheritance. Either would be sufficient to prevent any fiction of the law declaring the deed approved long after its execution from being effective from its date. There is no question but what these plaintiffs could have successfully maintained an ejectment suit for this land months after the death of their ancestor, and once having that right, they could not be deprived of it but by some act of their own. The doctrine of relation is a fiction of law and can not be operative upon a void agreement. *Doe vs. Howland*, 8 Cow. (N. Y.), 227.

"A thing of void can not be made good by relation."

Kansas City vs. O'Connor et al., 82 Mo. App., 655, 622.

SECOND POINT.

There was no delivery of the deed as a completed instrument. It was not ready for delivery before approval, simply handing to the grantee when not complete as a conveyance is not a sufficient delivery. The deed was void, not voidable. "The former are prohibited from being made, while the latter are not prohibited from being made, but from being enforced, and are not void, this being prohibited from being made, was void."

Kansas City vs. O'Connor et al., 82 Mo., App., 655.

In the case of *People vs. Van Ness*, 79 Calif., 85 (12 Am. St. Repts., 134), this principle is advanced, viz: "There was no delivery of the second official bond of Van Ness until the day on which it was approved. We can not see how there could have been any delivery until that date. The bond was not in condition to be delivered till

that date; prior to that time it was inchoat and imperfect as a bond.', Now, this deed not being operative till approved, should not be presumed to have been delivered till official approval of the same, which was after the death of the grantor, and hence too late. In the absence of all evidence it should be presumed to have been delivered after approval, and not before. "It is an essential prerequisite that the instrument in question should be understood by the parties to be completed and ready for delivery in order to have a mere placing it in the hands or possession of the grantee or his agents construed into a delivery.

Powell vs. Banks, 146 Mo., 620-623.

Washburn on Real Property (4 E. D.), 292.

"Clearly when it is said that the delivery of an instrument is complete when the grantor has parted with his control over it with intent that it shall pass to the grantee, it is meant that the grantor's intent is to deliver the instrument in the condition in which it is at the time, also that the grantee's assent thereto."

Powell vs. Banks, Supra, 634

THIRD POINT.

The land was allotted under the provisions of the treaty between the United States of America and Kas-kas-kia, Peoria and other confederated tribes of Indians, concluded on the 30th day of May, 1854, proclaimed August 10th, 1854 (U. S. Statutes, Vol. 10,) and was for the benefit of the said David Lykins, and his family. The rights of the said allottees, are to be determined by the treaty itself, and a correct construction of this treaty will show that the total land allotted to this reservee was 800, being 160 acres each, for himself and family, Plaintiffs in Error. Said reservee had no authority or right to sell said land himself. To convey said land a deed would have to be made by all parties interested.

FOURTH POINT.

The statute of limitations is no defense to this suit.

McGannon vs. Straightledge, 37 Kans., 506.

Respectfully submitted,

ROBINSON, BOWLING & McCLUER, and
W. M. SPRINGER.

Attorneys for Plaintiffs in Error.

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No. 90.
Brf. of Perry & Holmes
Filed Nov. 5, 1901.

Office Supreme Court U.S.
FILED
NOV 5 1901
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1901.

W. C. LYKINS and E. W. W. LYKINS,
Plaintiffs in Error,
vs.
MRS. R. McGRATH,
Defendant in Error.

Gen. No. 17808.
Term No. 90.

Motion to Dismiss and Brief Thereon.

W. C. PERRY,
DANIEL B. HOLMES,
FRANK M. SHERIDAN,
Attorneys for Defendant in Error.

Horn Printing Company,
Kansas City, Mo.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1901.

W. C. LYKINS and E. W. W. LYKINS,
Plaintiffs in Error,

vs.

MRS. R. McGRATH,
Defendant in Error.

Gen. No. 17808.
Term No. 90.

MOTION TO DISMISS.

Comes now the defendant in error above named, and moves the court to dismiss the pretended writ of error, purporting to have been sued out in this case, for the reasons following, to-wit:

1. Because said so-called writ of error was not made returnable on a certain day therein named, nor made returnable on any day.

2. Because said so-called writ of error was not made returnable to any given or stated term of this court.

3. Because the court has no jurisdiction to hear or consider the matters involved in the record, because the case did not arise "under the con-

stitution, laws or treaties of the United States;" and because the case is not one which this court can take cognizance of.

STATEMENT OF FACTS AND OBJECT OF MOTION.

The first two grounds of the motion are based on the fact that the writ of error (Record pp. 1, 2) fails to name any date whatever on which it is returnable.

The third ground of the motion is based on the idea that the federal courts have no jurisdiction of the action; and the further idea that if the circuit court had jurisdiction this is not one of the cases described in Section 5 of the Act of March 3, 1891.

The plaintiffs below—plaintiffs in error here—sought to recover possession of certain real estate, and damages for withholding possession thereof. They alleged (Record pp. 7, 8) that they are members of the Peoria tribe of Indians, and reside in the Indian Territory, and that said land was allotted to their father, David Lykins, a member of the Peoria tribe of Indians, under the treaty of May 30th, 1854 (10 Stat. 1082) and the act of March 3rd, 1859 (11 Stat. 430); that a patent, which conveyed the land to him, was issued on November 5th, 1859; that they are his heirs at law; that he conveyed the land on June 3rd, 1864; that he died on August 14th, 1864; and that the Secretary of the Interior did not give his consent to such deed until March 10th, 1865.

The sole contention of the plaintiffs is that the deed of their ancestor is void because the secretary did not consent to it till after the death of the grantor therein.

Wherefore, the defendant in error prays that the case be dismissed for want of jurisdiction.

W. C. PERRY,
DANIEL B. HOLMES,
FRANK M. SHERIDAN,
Attorneys for Defendant in Error.

NOTICE OF HEARING OF MOTION.

The plaintiffs in error, and their attorneys, will take notice that the foregoing motion will be submitted to the court on Monday, the 18th day of November, 1901, unless the case is reached for argument prior to that date; in which event said motion will be submitted on the date of the argument.

W. C. PERRY,
DANIEL B. HOLMES,
FRANK M. SHERIDAN,
Attorneys for Defendant in Error.

ACKNOWLEDGEMENT OF SERVICE OF MOTION.

Service of the foregoing motion and notice is hereby acknowledged this ——— day of October, 1901.

Attorney of Record for Plaintiffs in Error.

The material part of the writ of error (Rec. pp. 1-2) reads as follows:

" * * * do command you, if judgment be therein given, that *you* then, under your seal, distinctly and openly send the record and the proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that *we* have the said record and proceedings aforesaid at the City of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court on or before the —— day of ——, 1900, to the end that, the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done."

The judgment of the Circuit Court, from which the pretended writ of error was sued out, was rendered on November 22nd, 1899 (Rec. page 10). The so-called writ itself is dated on the 12th day of May, 1900; and, as shown in the above quotation, it was not made returnable to any given or stated term of this court, nor was it made returnable on any day or date whatever.

On April 16, 1900, the petition for a writ of error was granted. The order, then made, allowed the writ, without specifying when it should be returned (Rec. p. 13). The citation was issued and served on May 11, 1900. The citation itself is in violation of paragraph 5 of rule 14, in that it is made returnable 60 days from its date instead of 30 days.

In the parallel case of *Carroll v. Dorsey*, 20 How. 205, the court, after stating the facts, said:

"It is evident, from this statement, that the case is not before the court. The Act of 1789, section 22, requires that the writ of error should be made returnable on a certain day, therein named; and, indeed, upon common-law principles, a certain return day in a writ of error is essential to its validity. There is, therefore, no process by which the case is legally brought before this court, and consequently we have no jurisdiction over it. * * * ."

"But it is said, on behalf of the plaintiffs in error, that these are mere irregularities, which were waived by the general appearance at the last term, and that the motion at the present term is too late.

"Undoubtedly the appearance of the defendants at the last term, without making a motion to dismiss, cures the defect in the citation. The citation is nothing more than notice to the party to appear at the time specified for the return of the writ of error. And if he appears, it shows that he had notice; and if he makes no objection during the first term to the want of notice, or to any defect in the citation, he must be regarded as having waived it. The citation is required for his benefit, and he may therefore waive it if he thinks proper, and proceed to trial in the appellate court. This point was decided in the case of the *United States v. Yulee et al.*, 6 How. 603; but the court at the same time said that the appearance did not preclude the party from afterwards moving to dismiss for the want of jurisdiction, or upon any other sufficient ground.

"The same point was again decided in the case of *Buckingham et al. v. McLean et al.*, 13 How. 150, in which the court said that a motion to dismiss for want of a citation must be made at the first term at which the party appears, and it is too late if made at a subsequent term. But the want of a writ of error, such as is prescribed by the act of congress, stands on different ground. And in the case of the *United States v. Curry*, 6 How. 118, the court held that where the power of the court to hear and determine a case is conferred by acts of congress, and the same authority which gives the jurisdiction points out the manner in which it shall be brought before us, we have no power to dispense with the provisions of the law, nor to change or modify them.

"Upon this ground the case in not legally before us, and must be dismissed for want of jurisdiction."

This case has been frequently followed in subsequent decisions, and is still binding authority as to a record in the condition in which this is.

THE COURT HAS NO JURISDICTION.

The petition (Rec. p. 7) alleges that the plaintiffs are residents of the Indian Territory, and that the defendant is a citizen of the United States and a resident of Kansas. Hence the court below did not obtain jurisdiction by reason of the diverse citizenship of the parties—if it did this court has no jurisdiction.

The supposed basis of jurisdiction is that the case arises "under the * * * laws of the

United States, and treaties made, or which shall be made under its authority" (Const. Art. 3, Sec. 2), and that part of the act approved August 13, 1888, (25 Stat. 433), which provides that the circuit courts of the United States shall have jurisdiction of the cases described in the clause of the Constitution above cited.

Neither the treaty nor the Act of Congress above referred to will be construed by any decision that can be made in this case. Neither of those instruments created or conferred the right or title on which the plaintiffs rely. They claim by inheritance from the allottee. The treaty was executed when the allotment was made. The Act of Congress was fulfilled when the Secretary consented to the deed of the allottee. The only matter the court can decide is whether such consent, made after the death of the grant or in the deed, was effectual. Such a decision will not call in question the power conferred on the Secretary, nor require an interpretation of the act. The treaty and the act will be merely incidental to a decision of the matter in controversy.

It has frequently been decided that it is not sufficient that in the course of the litigation it may become necessary to construe the Federal Constitution or laws or treaties, but that the decision of the case must depend upon that construction. But it is not necessary here to go that far. The right of the allottee to the land set apart and conveyed to him under the treaty is not questioned. Indeed, both parties claim under the allottee.

The Act of Congress provided that the land should "never be sold or conveyed by the grantee or his heirs, without the consent of the Secretary of the Interior for the time being." It is conceded that the conveyance in question required the consent of the Secretary, and that it received such consent. The plaintiffs contend that because such consent was given after the death of the grantor it was ineffectual, and that therefore the deed itself was of no force. The defendant insists that the deed in controversy was properly executed and delivered by the grantor, and that the date of the consent of the Secretary is immaterial. The correct solution of this question will not require a construction of the treaty or the act. Neither of those instruments conferred the alleged title of the plaintiffs. Their complaint shows that they claim by descent from the allottee, and that such claim is based on an allegation that his deed was invalid, not because the Act of Congress was violated by the Secretary, but because the allottee happened to die—not before he sold the land—but before the Secretary performed his duty by consenting to the deed of conveyance. It is the deed—not the treaty, nor the statute—that must be construed. The controversy, therefore, does not involve a Federal question.

Gold Washing etc. Co. v. Keys, 96 U. S. 199.
Insurance Co. v. Wisconsin, 119 U. S. 473.
McCain v. City of Des Moines, 174 U. S. 168.

This is made apparent by section 5 of the act of March 3, 1891, (26 Stat. 827) as amended (29

Stat. 492) and the decisions construing that section.

The only clause of that section under which it can be claimed a writ of error in this case could be founded, reads as follows:

"In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question."

This act has been frequently before the court, and it would be an exhibition of useless pedantry to quote the decisions at large. In *Bank v. Peters*, 144 U. S. 570, and in many subsequent cases, it is said that there are six classes of cases in which a direct appeal or writ of error can be prosecuted to this court. If this case falls within either of those classes, it must be the fifth, and because it is necessary to construe the treaty under which the land was allotted to David Lykins. Manifestly, no such claim can be sustained; for, even if the controversy involves a construction of anything except the deed executed by David Lykins, and the consent of the secretary thereto, it is the act of congress, in which the restriction on alienation appears, that will be interpreted and not the treaty.

Obviously, the suggestion in the brief for the plaintiffs (p. 11) that the fifth amendment to the constitution will be violated if the deed in question is held to be effectual, will not bring the controversy within the fourth class of cases mentioned in the act. That suggestion is not put forth in

the petition of the plaintiffs; it is not made by the *record; it is introduced by counsel in their brief* merely by way of argument.

It is not perceived that the ruling on the jurisdictional question in *Pickering v. Lomax* militates against this contention. That case came here from the Supreme Court of Illinois, and it was held that this court had jurisdiction within the terms of Sec. 709, R. S., which provides, among other things, that a final judgment rendered in the highest court of a state may be reviewed where there,

"Is drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision is against their validity, * * * or where any title * * * is claimed under the Constitution, or any treaty or statute of * * * the United States, and the decision is against the title * * * specially claimed * * * under such * * * statute."

And it was held that the proviso in the treaty, there considered, which prohibited alienation without the permission of the president, remained in operation so long as the land was owned by the patentees or their heirs, and that the case raised the question of the validity of an authority exercised under the United States. But, as above shown, the present question of jurisdiction does not arise under Sec. 709, and *Pickering v. Lomax* is not, therefore, authority against this position of the defendant in error.

It may be urged that jurisdiction was conferred on the circuit court by the Act of August 15, 1894 (28 Stat. 286-2 Supp. R. S. 246).

The pertinent portion of that act reads as follows:

"That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto, in the proper circuit court of the United States.

"And said circuit courts are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within there respective jurisdictions, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty."

To confer jurisdiction under this statute, it must appear that the plaintiffs are entitled, or claim to be entitled, to an allotment of land under some law passed, or grant made, by congress, or that they have been unlawfully excluded from an allotment or other parcel of land which they are lawfully entitled to under some act of Congress. But this is not all: they must also show that they are in whole or in part of Indian blood or descent. The allegations in the petition are that their an-

cestor was "a member of said Peoria tribe of Indians", and that "they are members of the Peoria tribe of Indians." There is no allegation that David Lykins had any Indian blood in his veins, or that the plaintiffs have any in theirs; nor is there any averment which shows that the plaintiffs are entitled to or that they claim the land in controversy as an allotment, or that they are entitled to it by virtue of any act of Congress. Their claim to the land rests on the statute of descents of Kansas.

There is nothing in this case, so far as the plaintiffs are concerned, that appeals to the equitable instinct of the court. From the absence of any averment that the plaintiffs are of Indian blood or descent, or that their father was of Indian blood, and from the averments showing who the defendant is, and the claim for rents and profits, it may be fairly inferred that this is a contest between white men who hold membership in the Indian tribe by adoption, or by descent from an adopted member of the tribe, and an aged white woman, who bought and paid for the land more than a generation ago.

The motion should be granted, and the case dismissed.

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Attorneys for Defendants in Error.

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SUPREME COURT OF THE UNITED STATES

October Term, 1906.

No. ~~223~~. 90.

W. C. LYKINS AND E. W. W. LYKINS,
Plaintiffs in Error,
vs.
MRS. R. McGRATH,
Defendant in Error.

No. 17,808.

THE ALLOTTEE, HAVING SOLD AND CONVEYED THE LAND, HAVING PERFORMED EVERY ACT IN HIS POWER TO DIVEST THE TITLE, THE CONSENT OF THE SECRETARY COULD BE GIVEN AT ANY TIME, AND, WHEN GIVEN, IT RELATED BACK TO THE DATE OF THE DEED.

It will be seen from the statement of the case in the opposing brief that this was a case of ejectment. The father of the plaintiffs in error was a member of the Peoria tribe of Indians. The land in question was allotted to him under the second and third articles of the treaty of May 30, 1854. (Rev. Ind. Treat. 426). The patent is dated November 1st, 1859 (Rec. p. 8). An act of congress subsequently enacted (11 Stat. 430) required con-

veyances of the allotted lands to be made with the consent of the secretary of the interior. On June 3, 1864, the patentee of the land sold and conveyed it to one Baptiste Peoria, and the defendant holds under this deed. On August 14, 1864, David Lykins, the grantee in the patent, departed this life. The consent of the secretary to the conveyance was given on March 10, 1865. No fraud or imposition is alleged. The sole basis of the action is the death of the patentee intermediate the date of his conveyance and the approval thereof by the secretary. The plaintiffs in error, if they ever had any title to the land, obtained it by inheritance on August 14, 1864. They slept on their rights, if they had any, from that date until March 30, 1899, or almost thirty-five years. The period of prescription as to real estate in Kansas is 15 years. (See Clause 4, Section 16, Kan. Code, Gen. Stat. 1899, p. 877).

In *Pickering v. Lomax*, 145 U. S. 310, the land involved was patented to Alexander Robinson, an Indian, on December 28, 1843, under article IV of the treaty of Prairie du Chien (7 Stat. 321). The grant was to Robinson for himself and children, and the treaty prohibited the conveyance of the land by him or them, or either of their heirs, without the permission of the president. In a partition suit the land was awarded to Joseph Robinson, one of the children of Alexander Robinson. On August 3, 1858, Joseph Robinson and wife conveyed the land to John F. Horton; on October 6, 1863, the administrator of Horton con-

veyed to one Baer; and the plaintiff claimed through Baer under a deed dated Nov. 10, 1866. On January 21, 1871, the president endorsed his approval on said deed. Mr. Justice BROWN states the point at issue in these words:

"The defendant introduced no evidence, but at the close of the plaintiff's case moved that the plaintiff's testimony be excluded, and the case dismissed, upon the ground that the deed of August 3, 1858, from Joseph Robinson and wife to John F. Horton was made in direct violation of the terms of the patent as to obtaining the approval of the President to the conveyance.

"This motion was sustained, the court being of the opinion that Robinson had no authority to convey without obtaining the permission of the President beforehand, that the subsequent sanction obtained by persons claiming title under Robinson was invalid; and that, even if such sanction would have the effect of giving force to the deed, yet, as the grantee under that deed was dead, the administrator's deed would not carry any title to the purchaser from the administrator, but that, if any title accrued by reason of the sanction of the president, it would be to the heirs of Horton.

"Thereupon the court rendered judgment for the defendant, which was affirmed by the Supreme Court of Illinois (11 N. E. Rep. 175, 120 Ill. 293) and the plaintiff sued out a writ of error from this court."

It will thus be seen that the only difference between that case and the one at bar is that there the *grantee* died before the deed was approved by the president, while here the *grantor* died before the secretary consented to the deed. It does not

appear either in the statement of facts made by this court, or in that made by the Supreme Court of Illinois, whether the grantor was living or dead when the deed was approved.

The dissenting opinion of Mr. Justice Sheldon, 11 N. E. Rep. 175, 179, is very persuasive to the point that the death of neither party to the deed took from the secretary the power which the law conferred upon him. At the time Lykins made the conveyance he held the absolute fee in the land, with the single qualification that he should not convey it without the consent of the secretary. We have, therefore, a conveyance of the land made by Lykins for a valuable consideration, with the consent and approval of the secretary endorsed thereon. The date when this approval was obtained is immaterial. The secretary did consent to the conveyance, and that consent fulfilled the condition of the statute. That condition was designed for the benefit of the Indians, and as a safeguard of their interests against fraud, imposition or improvidence. Congress deemed it wise to exercise a supervisory care over the disposition of the land, and expressed its policy by enacting that the secretary's consent should be obtained to all conveyances. This consent was a duty imposed on the secretary and no one else. How and when he should perform it was for him to determine, and not for the court to adjudge. No time or form of giving the consent was prescribed. Having given his consent to the deed it will be presumed that the secretary discharged

his duty in the light of all the facts, and determined that the grantee paid fair value for the property, and that no covin or imposition was practiced on the grantor.

In *Godfrey v. Beardsley*, 2 McLain, 412, Justice McLAIN said:

"Neither the treaty nor any law prescribes the form in which this sanction (permission) should be given. The treaty imposed the duty upon the president, and he could execute it in such form and manner as his discretion should dictate. * * * Except by permission of the president, Pierre Moran could not convey this land. That permission was obtained before the deed was executed. Now, whether it would have been more judicious to have withheld the sanction until the execution of the deed is a matter about which differences of opinion may exist. But whether given before or after the deed, it is equally within the power of the president."

So in *Jackson v. Hill*, 5 Wend. 532, the approval of the surveyor-general required by law to the deed of an Indian was held to relate back to the date of the deed.

This case and *Godfrey v. Beardsley*, (cited as *Doe v. Beardsley*) are approved and followed in *Pickering v. Lomax*.

When Lykins conveyed the land and received the consideration he did everything he could to divest himself of the title. It was the case of an execution and delivery of a deed to be effective on the happening of a certain event. The date when that event should happen was immaterial,

so far as Lykins, or his heirs, are concerned. The event did happen, and thereupon the deed became as fully effective as a deed placed in escrow would on performance of the specified conditions. The fact that the death of the grantor occurred between the date of the deed and its approval does not affect the question, because the deed had been made and delivered and the consideration paid during the life time of the grantor. The grantee, after he received the deed, had a right to secure the assent of the secretary at any time. That he delayed or was delayed in securing this consent is a matter no one but a *bona fide* purchaser can complain of. Considering the reasons which caused the restriction on the right to convey to be enacted; that is, the protection of the Indian from a bad contract, it would seem that his intervening death could not and should not affect the power of the secretary to approve the conveyance It was as fully within the power of the secretary after the death as it was before to discharge the duty imposed upon him by the law. His approval was required, not as a limitation on the right of the grantor to agree to convey or to convey, but solely in the exercise of the supervisory power of the government over the Indians and their affairs.

It is not the case of a deed executed but not delivered during the lifetime of the grantor, nor a deed executed by an attorney in fact after the death of his principal.

The perfecting of the deed depended solely on the action of the secretary, and when he acted the conveyance was complete, both as against the grantor and his heirs. It avails naught to say, as counsel do, that there is nothing to show that the approval of the deed was not contemplated until after the death of Lykins, for the reason that when he signed and delivered the deed he plainly requested the secretary to consent to it.

It is said this case is unlike one where the grantee died, but no reason for the statement is given. If, as argued in one place, the deed was always void; or, as in another, that it could not be delivered until after the approval, how could such approval ever validate it. The deed in *Pickering v. Lomax*, after approval, was held to be good as against the grantor, and his heirs, from its date. It could not, therefore, have been void, and it must have been delivered before the president acted. Inasmuch as there must be two parties to such a deed, it is clear, if the position of the plaintiff is sound, that the death of either party would end the power of the secretary; and yet this court, in the case just mentioned, held that the death of the grantee did not affect that power. Why, then, should the death of the grantor affect it? If there is any reason why the principle of that case does not decide this one, opposing counsel have signally failed to call attention to it.

Such cases as *McGannon v. Straightledge*, 37 Kan. 87, and *Stevens v. Smith*, 2 Kas. 245, s. c. 10 Wall. 321, are not in point. In the former

case the defendant claimed under a deed made two years before the patent was issued, and which was never approved, while the plaintiff claimed under a conveyance from the heir of the allottee, which was approved. In the latter case the treaty provided (10 Wall. 322) that the land should never be sold without the permission of the United States first had and obtained. Subsequently congress enacted (pp. 322-3) that the land could only be sold by the secretary on request of the allottees. Said act also vested the title to the lands in the United States, and declared void all prior contracts in reference thereto (pp. 325-6). It was because the deed in controversy in that case violated the provisions of the act of congress that it was held void.

The point is made by the plaintiff's that rights of third parties have intervened. By this it must be meant that the rights of the plaintiff's themselves intervened on the death of their ancestor. In *Pickering v. Lomax*, it is held that an approval made about thirteen years after the date of the deed related back to its date and made it effectual: provided, of course, that no third parties had in the meantime legally acquired an interest in the land. This must mean such third parties as are mentioned in the cases cited in the opinion; and they all show that no right of a *bona fide* purchaser has here intervened. It is unnecessary to do more than to quote the definition of that phrase as given by Devlin on Deeds, 2nd Ed., Sec. 813.

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"In order that a person may claim that he occupies the position of a *bona fide* purchaser, when questions arise as to the priority of two or more titles or claims to the same property, it is essential, as one of the facts giving him this character, that he has acquired his right for a valuable consideration. A person who is a mere volunteer, having acquired title by gift, inheritance, or some kindred mode, cannot come within the scope of the term '*bona fide* purchaser'. To enable the grantee to claim protection as a *bona fide* purchaser he must have parted with something possessing an actual value, capable of being estimated in money, or he must on the faith of the purchase have changed, to his deteriment, some legal position that he before had occupied."

U. S. v. Des Moines etc. Co., 142 U. S. 510.

It is also claimed that the death of Lykins prevented the act of the secretary from relating back to the date of the deed. But Mr. Justice FIELD, in *Gibson v. Choteau*, 13 Wall. 92-100-101, says that the doctrine of relation means "that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed." It is a doctrine adopted "*for the purposes of justice.*"

Mr. Justice BROWN, in *Pickering v. Lomax*, *supra*, places the decision of the court in that case on the following grounds:

"The treaty does not provide how or when the permission of the president shall be obtained, and there is certainly nothing which requires that it shall be given before the deed is delivered. *Doe v. Beardsley*, 2 McLean, 412. It is doubtless, as was said by the Supreme Court of Mississippi in *Harmon v. Partier*, 12 Smedes & M. 425, 427, 'a condition precedent to a perfect title' in the grantee; but the neglect in this case to obtain the approval of the president for 13 years only shows that for that length of time the title was imperfect, and that no action of ejectment would have lain until the condition was performed. Had the grantee, the day after the deed was delivered, sent it to Washington, and obtained the approval of the president, it would be sticking in the bark to say that the deed was not thereby validated. A delay of 13 years is immaterial, provided, of course, that no third parties have in the meantime legally acquired an interest in the lands.

"If, after executing this deed, Robinson had given another to another person, with the permission of the president, a wholly different question would have arisen. But, so far as Robinson and his grantees are concerned, the approval of the president related back to the execution of the deed and validated it from that time. As was said by this court in *Cook v. Tullis*, 18 Wall. 332, 338: 'The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification.' See, also, *Fleckner v. Bank*, 8 Wheat 338, 363. In *Ashley v. Eberts*, 22 Ind.

55, a similar act of the president approving a deed was held to relate back and give it validity from the time of its execution, so as to protect the grantee against a claim by adverse possession which arose in the interim between its date and the confirmation. 'Otherwise,' said the court, 'a mere trespasser by taking possession after a valid sale, and before its consummation, would have power to defeat a *bona fide* purchaser.' * * *

"Nor do we consider it material that the grantee had in the meantime died, since, if the ratification be retroactive, it is as if it were endorsed upon the deed when given, and inures to the benefit of the grantee of Horton, the original grantee, not as a new title acquired by a warrantor subsequent to his deed inures to the benefit of the grantee, but as a deed, imperfect when executed, may be made perfect as of the date when it was delivered. This was the ruling of the court in *Steeple v. Downing*, 60 Ind. 478.

"The object of the proviso was not to prevent the alienation of lands *in toto*, but to protect the Indian against the improvident disposition of his property, and it will be presumed that the president, before affixing his approval, satisfied himself that no fraud or imposition had been practiced upon the Indian when the deed was originally obtained."

The case was again before the court in *Lomax v. Pickering*, 173 U. S. 26, and the ground upon which the former decision was placed is stated in these words.

"The case was reversed by this court upon the ground that the approval subsequently given by the president to the conveyance was retroactive and was equivalent to permission before execution and delivery."

Pickering's title has already been stated. Lomax claimed title under a deed from Joseph Robinson to Alexander McCluer, dated November 22, 1870, and approved by the president February 24, 1871. It is thus seen that the deed from the Indian to Pickering's grantor was dated August 3, 1858, and approved January 21, 1871, and that the conveyance from the Indian, under which Lomax claimed, was dated November 22, 1870, and approved February 24, 1871. The stress of the case when last decided sheds no direct light on this controversy; but it is significant that the title resting on the earlier deed was upheld, although it was not recorded, with the approval of the president endorsed thereon, until after the subsequent deed, with a like approval endorsed thereon, was recorded. The unapproved deed being recorded, was held competent to convey notice to subsequent purchasers, which, of course, could not be true, if it was void.

It is true that this court, in *Libby v. Clark*, 118 U. S. 250, held that the title conveyed to an Indian allottee is a fee simple title, and that the restriction on the right of the allottee to convey does not deprive the title of the character of a fee simple estate; and it is largely by reason of the fact that Lykins owned such a title when he sold the land that we insist his conveyance was valid, although incomplete, at its date. In all other respects *Libby v. Clark* differs wholly from this case, because by the 7th article of the treaty of June 24, 1862, there under consideration, it was

stipulated that the land should not be alienated until, by the terms of the treaty, the allottees became citizens of the United States.

The authorities already cited make it unnecessary to combat the position of opposing counsel that the secretary, by consenting to the deed in question, undertook to sell the land. The averments of the petition refute their other position, that a deed, to be good, must be signed and delivered during the lifetime of the grantor. For some reason they alleged that the allottee did not ask the secretary to give his consent to the deed, and that it was presented to the secretary for approval after the death of the allottee. It is not disclosed, by substantive averment, what was done with the deed after it was executed, but it is fairly inferable, from what is said, that it was delivered to the grantee, and that he presented it to the department for approval.

The opposing brief is rich in assertion but poor in argument. There is no analogy between a deed made by an attorney in fact, after the death of his principal, and a deed fully executed and delivered during the life of the grantor, and imperfect only in the sense that it has not been consented to by an authority having supervisory power over his business and property. Counsel say (brief p. 9) that the approval of the deed, without the request of the heirs of the grantor, after the death of the grantor, was simply an attempt to make a void deed valid; and they add that such a power was not vested in the secretary, because he

could only consent that the Indian himself might make a deed. The fallacy of this argument is apparent. The grantor had made the deed. It was valid so far as he could make it valid. He had received value for it and the secretary is presumed to have so found. As said in *Ashley v. Eberts*, there had been a sale and a purchase subject to the approval of the secretary, and the act of that officer was simply the consummation of the contract. In the face of all this the plaintiffs, upon the most meritless quibble imaginable, claim that their ancestor never parted with his title, because he died before the secretary consented to his deed. According to this the deed would have been void if the grantor had died immediately after signing it and putting the consideration in his pocket and before the secretary could be advised of the sale. In that case, if not in this, the plaintiffs would have inherited the money and also the land. As suggested by Mr. Justice BROWN, it "would be sticking in the bark," with a vengeance, to hold that such a deed is void, for Lykins died about three months after he executed it.

Equally sophistical is the attempt to differentiate this case from *Pickering v. Lomax*. Counsel say that where the *grantee* in an Indian deed dies before it is approved, the title, when the deed is approved, enures to his heirs. In the next breath they say the deed is void until and unless approved; and the logic of this position inevitably is that the consent of the secretary must be obtained before the sale is made or the conveyance execut-

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ed. If the effect of the death of an Indian grantor is to annul a deed made by him, but not consented to till after his death, there is no possible escape from the conclusion that the death of the grantee would have the same effect. If the assent of the secretary is the thing which gives vitality to such a deed—if such a conveyance is nothing but waste paper until the secretary assents to it—then, when such assent is given, both grantor and grantee must be living. If either party dies the deed dies with him; and the title no more enures to the heirs of the grantee, than does the liability on the covenants of the grantor fall on his heirs.

But, say counsel (as though that was a material consideration), there is nothing to show that the grantor ever requested the secretary to approve his deed; that the most that can be assumed is that he attempted to make an unauthorized, and, therefore, ineffectual sale; and that after his death some one procured the approval of the deed, without the knowledge or consent of the plaintiffs.

The vice of this argument is best illustrated by the averments of the petition. Those averments are that the grantor did not, during his lifetime, sell or convey the land with the consent of the secretary; that he did sell and convey it without the prior consent of that officer, and that such consent was given after the grantor's death. The necessary implication from these averments is that Lykins sold the land for value, and executed and delivered a deed which required

only the assent of the secretary to make it perfect and effectual; and the allegation that the conveyance was presented to the secretary is equivalent to saying that the grantee presented it after its delivery to him by the grantor.

Here, then, was an imperfect deed, accompanied by an implied request for approval by the officer whose consent to it was necessary, coupled with the presumptions arising from the conveyance, that it was executed for value, and (from the possession thereof by the grantee), that it had been delivered The request—*i. e.* the deed of the grantor—was presented by the grantee, presumably with the necessary evidence of fairness and good faith to enable the secretary to give his consent to it. There was nothing lacking in the transaction at its date, nor on the day Lykins died, except the formality of the secretary's consent.

With such a case *Hunt v. Rousmanier*, 8 Wheat. 174, cited by opposing counsel, and in which it is held that the authority conferred by a naked power of attorney is revoked by the death of the party who conferred it, has nothing in common. Neither have the other cases on our adversaries brief, in which it was held that deeds made by Indians, and *never* approved, conveyed no title.

All that was necessary here was to obtain the *assent* of the secretary to the *act* of Lykins; when such assent was given is of no importance. When given it related back to the act, and whether the actor was then living or dead is equally imma-

terial. The demise of Lykins did not disable the secretary from the performance of his duty; he was as fully qualified after that occurrence as before to decide whether the transaction was such as he ought to assent to.

THE DEED IN CONTROVERSY IS SHOWN BY THE AVERMENTS OF THE PETITION TO HAVE BEEN DELIVERED.

It has already been shown that the averments of the petition fairly imply a delivery of the deed. It is manifest that the pleader relied wholly on the quirk that the secretary assented to the deed after Lykins died. It is not putting the case too strongly to say that a delivery of the deed must be inferred from the averment that it was executed and assented to by the secretary. The authorities already referred to sufficiently show that, under the circumstances of this case, there was a delivery.

It is manifest, from the opinion in *Pickering v. Lomax*, that the court considered the deed in that case delivered as of its date, and that the grantee was vested with the right to present it for approval. So, here, Lykins should be presumed to have delivered the deed when he received the consideration. The averment is that he did not request the consent of the secretary. Therefore, the grantee must have made the request, and must have deposited the instrument with the secretary. He could only have obtained possession of it from Lykins.

Bouvier's Law Dict. (Rawle's Revision) says that a deed is always delivered when parted with by the grantor with an intent that it shall become a muniment of title in the grantee.

Devlin on Deeds, Sec. 260, says that delivery is the act of the grantor indicated either by acts or words, or both, which shows the intention on his part to perfect the transaction by a surrender of the instrument to the grantee, or to some third person for his benefit; and it is well settled that the question of delivery is always one of intention. Of course, delivery of a deed is essential to its validity; yet, as in *Gould v. Day*, 94 U. S. 405, 412, a delivery will be presumed from the concurrent acts of the parties recognizing a transfer of title. After Lykins executed the deed in question and received the consideration, he certainly had no right to retain control of it.

And, as held in *Games v. Dunn*, 14 Pet. 322, possession of a deed by a party claiming under it is *prima facie* evidence of its delivery.

Why it was necessary to cite to this point such a case as *Kansas City v. O'Connor*, 82 Mo. App. 655, is not apparent. That was an action on a bond given for the faithful performance of a contract for street improvements, which also bound the contractor to sprinkle the street. It was decided that this part of the contract was *ultra vires*; and the conclusion was reached that the contract was an entirety; and, as part of it was void, all of it was.

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Equally inapplicable is *People v. Van Ness*, 70 Cal. 85, 21 Pac. Rep. 554. That was an action on the official bond of Van Ness. The bond was dated on January 11, 1876, and was superseded by another bond dated April 12, 1876. This latter bond was required to be approved by the governor and filed in the office of the secretary of state. It was held that the second bond did not supersede the first one until it was approved and filed; and the court incidentally remarked that there was no delivery of it until it was approved.

Another case cited in the opposing brief is *Powell v. Banks*, 146 Mo. 620. The question there was as to which of two trust deeds was the prior lien on certain land. Among other things the defendants contended that there was no delivery of the deed of trust under which the plaintiff claimed (p. 632). This contention was based on the fact that the deed was signed by Banks and left at a bank to be signed by his wife, and then delivered. The plaintiffs insisted that the deed was good as to Banks, notwithstanding his wife did not sign it. While the case is not in point the authorities referred to in the opinion show that the position already taken in this argument as to delivery is the correct one. For example, quoting from 2 Greenl. Ev. (15 Ed.) § 297, it is said that "the delivery of a deed is complete when the grantor has parted with his dominion over it, with the intent that it shall pass to the grantee, provided the latter assents." And the court concurs with the statement already made, that the

delivery of a deed is largely a question of intent, and that the presumption of delivery follows from the possession or the deed by the grantee.

THE CLAIM THAT THE PLAINTIFFS WERE NECESSARY PARTIES TO THE DEED EXECUTED BY DAVID LYKINS IS UNSOUND, AND IS NOT RAISED BY THE RECORD.

The second article of the treaty of May 30, 1854, ceded to the government all the land then occupied by the Indian tribes, excepting an amount equal to 160 acres for each member of the tribe, and ten additional sections reserved for other purposes. Article 3 provided that individuals and heads of families of the tribe should select the land reserved for them, and that patents therefor should be issued to the persons or heads of families entitled thereto. The schedule attached to the treaty shows that there were five persons in the family of David Lykins, and that he was entitled to a patent for 800 acres of land. Accordingly a patent, a copy of which is printed in the record, was issued to said Lykins, which conveyed to him the legal title to the land therein described. No estate in the land was conveyed to the members of his family. The treaty proceeded upon the idea that the head of the family was entitled to a conveyance of all the land he and his family were entitled to, and the patent followed the treaty.

THE SECOND AND THIRD POINTS IN THE BRIEF WERE NOT MADE IN THE COURT BELOW.

It is not averred in the petition that the deed was not delivered, nor that the plaintiffs were necessary parties to it. The distinct averment is that the land was conveyed to David Lykins, and that it descended to the plaintiffs, as his heirs at law, because of the informality in the deed already adverted to. The assignment of errors is consistent with the petition in this respect, and the first appearance of these points is in the brief.

Under section 4, paragraph III, of rule 21, and Sec. 997, R. S., these points can not be considered. And, even though they had been made in the assignment of errors, it is well settled that they could not be thus imported into the case. The record must show that every point this court is asked to decide was raised in the court below.

Ansbro v. United States, 159. U. S. 695.
Cornell v. Green, 163 U. S. 75.

It would be a waste of time and space to multiply citations of authority to this proposition.

THE KANSAS STATUTE OF LIMITATION BARS THE ACTION.

The second paragraph of the demurrer (Rec. p. 10) invoked this defence. The statute relied on provides that a civil action for the recovery of real property can only be commenced within fifteen years after the cause of action accrues. The

petition alleges that the title to the land descended to the plaintiffs on August 14, 1864. If the plaintiffs ever had the right to institute this action, it accrued to them on that date, and has continued to exist ever since. If they have the right to go into the courts to vindicate their rights, they ought to be governed by the general law applicable to all litigants. They aver no disability, unless it arises from their membership in the Indian tribe, or the allotment of the land to David Lykins. Neither of these facts prevented the institution of an action by the plaintiffs. The courts of Kansas were open to them during all this time; and there is as much reason why a statute of limitations should be enforced against these plaintiff as there was for invoking the doctrine of laches against the plaintiff in *Felix v. Patrick*, 145 U. S. 317, 332. If the plaintiffs had the right to bring an action they certainly will not be exempted from the consequences of not bringing it within the time limited by the statute.

The ruling in *McGannon v. Straightledge*, 32 Kansas 524, is not in point. That was ejectment by McGannon to recover a tract of land allotted to one Pa-kan-giah, a member of the Peoria tribe, to whom it had been allotted under the treaty of May 30, 1854. Pa-kan-giah conveyed the land to Baptiste Peoria, the same person to whom Lykins conveyed the land involved here. That deed was never approved. The allottee having died, his sole heir conveyed the land, to McGannon, and that conveyance was approved.

It was admitted that the deed from Pa-kan-giah was void, and that the land remained Indian land, and the title an Indian title, until it was conveyed by the heir of Pa-kan-giah to McGannon. In other words, it remained Indian land until June 23, 1882, the date of McGannon's conveyance On April 25, 1883, McGannon commenced his action. Unquestionably, within the repeated rulings of this court in such cases as *The Kansas Indians*, 72, U. S. 737, *Stevens v. Smith*, 77 U. S. 321, and *Gibson v. Chouteau*, 80 U. S. 92-99, no statute of limitations ran against Lykins or his heirs so long as congress retained control of the alienation of the land; and the only doubt as to this point arises under the act of congress (passed pursuant to the treaty) restraining the sale of the property without the consent of the secretary of the interior. But if the deed under which the defendant holds was valid, or by relation became valid, such control of congress terminated on that date, and the possession of Mrs. McGrath, which by the petition commenced in and has been continuous since 1865, put the statute of limitations in operation. In Kansas, adverse possession of land for fifteen years, even without color of title, bars an action of ejectment brought by the owner of the record title.

Anderson v. Burnham, 52 Kan. 454.

The limitation of actions in the federal courts "is governed by the *lex fori*, and is controlled by

the legislation of the state in which the action is brought, as construed by the highest court of that state."

Great Western Tel. Co. v. Purdy, 162 U. S. 329, 339.

For the reasons stated in the motion to dismiss, the writ of error should be dismissed; if not, the judgment should be affirmed.

Respectfully submitted.

W. C. PERRY,
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FRANK M. SHERIDAN,
Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 90.—October Term, 1901.

W. C. Lykins and E. W. W. Lykins, Plaintiffs in Error, vs. Mrs. R. McGrath. } In error to the Circuit Court of the United States for the District of Kansas.

[February 24, 1902.]

Under and by virtue of the provisions of a treaty between the United States of America and the Kas-kas-kia, Peoria and other confederated tribes of Indians, concluded on the 30th day of May, 1854, proclaimed August 10, 1854, (10 Stat. 1083,) and an act of Congress approved March 3, 1859, (11 Stat. 431,) the southeast quarter of section No. fifteen (15), in township No. seventeen (17), south of range No. twenty-three (23) east, in the territory, now State, of Kansas, and other lands, were on November 1, 1859 conveyed by the United States of America by letters patent to Ma-cha-co-me-yah, or David Lykins, a member of the said Peoria tribe of Indians, being "Peoria Reserve No. 14." The patent contained the following provision: "That said tracts shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior, for the time being." On June 3, 1864, the patentee, David Lykins, conveyed the land to one Baptiste Peoria, by deed of that date, which deed was on March 10, 1865, presented to the Secretary of the Interior, and by him approved. Intermediate the making of the deed and the approval of the Secretary of the Interior, to wit, on August 14, 1864, the patentee died, leaving the two plaintiffs in error (plaintiffs below) as his sole heirs. This action in ejectment was commenced by them on March 18, 1899, in the Circuit Court of the United States for the District of Kansas against the defendant, in possession and claiming title under the deed to Baptiste Peoria. A demurrer to an amended petition was sustained, and judgment entered in favor of the defendant, whereupon this writ of error was sued out.

Mr Justice Brewer delivered the opinion of the Court.

It is contended by the plaintiffs that the deed from David Lykins, not having been approved before his death, became thereby an absolute nullity; that title immediately vested in them, free from any claim of the grantee in the deed; that they never asked for the approval of the Secretary of the

Interior; never consented that it should be given; never in any way ratified or assented to the deed of their ancestor, and that the Secretary was without any authority after the death of the patentee to approve the latter's deed.

The eleventh section of the act of 1859, superseding in this respect the treaty of 1854, contained a general provision in reference to restricted patents to Indians in Kansas, that the Secretary of the Interior should cause them to be issued "upon such conditions and limitations, and under such guards or restrictions as may be prescribed by said Secretary," and in pursuance of this section the restriction referred to was placed in this patent. That the consent of the Secretary was effective, though given after the execution of the deed, was determined in *Pickering* v. *Lomax*, (145 U. S. 310.) In that case the patent to the Indian contained a stipulation, authorized by treaty, that the land should not be conveyed "to any person whatever, without the permission of the President of the United States." A deed was made by the Indian holder of the title on August 3, 1858, which was approved by the President on January 21, 1871, nearly thirteen years thereafter, and it was held that the approval related back to the time of the execution of the deed, and made it valid as of that date. In other words, the antecedent approval of the President was not a condtion of the validity of the deed. It was enough that he approved what had been done. It is true that it does not appear that the Indian grantor had died intermediate the making of the deed and the approval of the President, (and in this respect that case differs from the present,) but the grantee from the Indian had died during such interval, and only by way of relation could the action of the President be considered as making effective an otherwise void deed to a dead man. That case came before this court a second time, (*Lomax* v. *Pickering*, 173 U. S. 26, 27,) and in the opinion then filed the scope of the prior decision was thus stated: "The case was reversed by this court upon the ground that the approval subsequently given by the President to the conveyance was retroactive, and was equivalent to permission before execution and delivery."

It must, therefore, be considered as settled that the consent of the Secretary of the Interior to a conveyance by one holding under a patent like the present may be given after the execution of the deed, and when given is retroactive in its effect and relates back to the date of the conveyance.

But the applicability of the doctrine of relation is denied on the ground that the interests of new parties, to wit, the plaintiffs, have sprung into being intermediate the execution of the conveyance and the approval of the Secretary. But one of the purposes of the doctrine of relation is to cut off such interests, and to prevent a just and equitable title from being interrupted by claims which have no foundation in equity. The doctrine of relation may be only a legal fiction, but it is resorted to with

the view of accomplishing justice. What was the purpose of imposing a restriction upon the Indian's power of conveyance? Title passed to him by the patent, and but for the restriction he would have had the full power of alienation the same as any holder of a fee simple title. The restriction was placed upon his alienation in order that he should not be wronged in any sale he might desire to make; that the consideration should be ample; that he should in fact receive it, and that the conveyance should be subject to no unreaonable conditions or qualifications. It was not to prevent a sale and conveyance, but only to guard against imposition therein. When the Secretary approved the conveyance it was a determination that the purposes for which the restriction was imposed had been fully satisfied; that the consideration was ample; that the Indian grantor had received it, and that there were no unreasonable stipulations attending the transaction. All this being accomplished, justice requires that the conveyance should be upheld, and to that end the doctrine of relation attaches the approval to the conveyance and makes it operative as of the date of the latter.

Counsel for plaintiffs in error would liken this deed to a power of attorney—a mere authority to convey, which loses its vitality at the death of the grantor of the power. It seems to us more like a deed fully executed and placed in escrow, to be finally delivered on the performance of a condition. While ordinarily in case of an escrow title passes at the date of the second delivery, yet often, for the prevention of injustice, the deed will relate back to the first delivery so as to pass title at that time. "If the grantor being a feme sole should marry, or whether a feme sole or not should die or be attainted after the first and before the second delivery, and so become incapable of making a deed at the time of second delivery, the deed will be considered as taking effect from the first delivery, in order to accomplish the intent of the grantor, which would otherwise be defeated by the intervening incapacity." (*Prutsman* v. *Baker*, 30 Wis. 644, 649; *Vorheis* v. *Kitch*, 8 Phila. 554; *Harkreader* v. *Clayton*, 56, Miss. 383; *Black* v. *Hoyt*, 33 Ohio St. 203.)

The plaintiffs have no equities superior to those of the purchaser. They are the heirs of the Indian grantor, and as such may rightfully claim to inherit and be secured in the possession of all that property to which he had at his death the full equitable title; but when, as is shown by the approval of the Secretary, he had received full payment of a stipulated price and that price was ample, and he had been subjected to no imposition or wrong in making the conveyance, then their claims as heirs cannot be compared in equity with those of the one who had thus bought and paid full value. They certainly do not stand in the attitude of *bona fide* purchasers. "A person who is a mere volunteer, having acquired title by gift, inheritance, or some kindred mode, cannot come within the scope of the term '*bona*

fide purchaser.' To enable the grantee to claim protection as a *bona fide* purchaser he must have parted with something possessing an actual value, capable of being estimated in money, or he must on the faith of the purchase have changed, to his detriment, some legal position that he before had occupied." (Devlin on Deeds, sec. 813.)

As, therefore, it has been settled by *Pickering* v. *Lomax*, *supra*, that approval by the Secretary may be retroactive and take effect by way of relation as of the date of the deed, and as it appears from the fact of the approval by the Secretary that the Indian grantor received full payment for his land and was in no manner imposed upon in the conveyance, and as these plaintiffs have no equitable rights superior to those of the grantee in that deed, it follows that the title conveyed by it must be upheld. The judgment of the Circuit Court is,

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.